2008

Gary B. Ferguson vs. Williams and Hunt INC, Elliot J. Williams, George A. Hunt, and Kurt Frankenburg : Reply Brief

Utah Supreme Court

IN THE UTAH SUPREME COURT

No. 20080273

GARY B. FERGUSON,
Plaintiff/Appellant,

vs.

WILLIAMS & HUNT, INC., ELLIOTT J. WILLIAMS, GEORGE A. HUNT, and KURT FRANKENBURG,

Defendants/Appellees.

REPLY BRIEF OF APPELLANT

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FACTS

Appellees, for nearly all "facts" specified in their Response Brief, fail to cite to the record. Under the Utah Rules of Appellate Procedure, "[a]ll statements of fact . . . shall be supported by citations to the record in accordance with paragraph (e) of this rule." Utah R. App. P. 24(a)(7). Rule 24(k) allows this Court to disregard or strike, on motion or sua sponte, all unsupported factual assertions.

Also, rather than controvert Appellant's citations to the record, appellees, in a wholly unsupported and conclusory manner, merely and repeatedly state that Appellant Ferguson "failed to offer any evidence" (Appellees' Br. at 3), or "FAILED TO PRESENT ANY EVIDENCE" (*id.* at 4) or he "pointed to no evidence at trial" (*id.* at 9) or the "total absence of any evidence presented at trial" (*id.* at 10) or to "no evidence presented below" (*id.*) or he "offered no evidence at trial" (*id.* at 11) or of "no evidence" (*id.* at 12) or "Ferguson doesn't identify any evidence offered at trial" (*id.* at 14) or "the evidence offered at trial did not support such a claim" (*id.*) or he "failed to present any evidence of damage" (*id.* at 15), and rest on the result below by only asserting "Ferguson's failure to present any evidence in support of his claim." (*Id.*).

Ferguson cited to the summary judgment proceedings, including specific deposition testimony and exhibits, and to the trial transcript to show that defendants/appellees acted with malice and thus abused any conditional privilege that may have existed. In this record evidence, Ferguson illustrated the self-contradictory testimony from defendants/appellees and the unsupportable statements made when compared to the facts of the situation. The jury should have been allowed to determine

this matter based on the direct evidence from Arthur Glenn and Gary Ferguson and the circumstantial evidence from the context and circumstances surrounding the situation; and, thus, the directed verdict was error. The Model Utah Jury Instructions, Second Edition, provide details of the jury's role in this regard:

> **CV120 Direct and circumstantial evidence.**
> A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts or circumstances that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.
>
> **CV121 Believability of witnesses.**
> Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:
>
> (1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?
>
> (2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?
>
> (3) Demeanor. Is there anything about the witness's appearance, conduct or actions that causes you to give more or less weight to the testimony?
>
> (4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?
>
> (5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?

(6) Memory. Does the witness's memory appear to be reliable?

(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?

These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.

CV122 Inconsistent statements.

You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.

CV123 Effect of willfully false testimony.

If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.

Ferguson presented competent evidence showing that Williams made both inconsistent statements and willfully false testimony; indeed, he could not even point to any specific instance of Ferguson over-billing! (R. at 185, Ex. E at 98-101; 864-158). Williams stated the law firm was "unable to determine which specific entries – typically were unable to determine which specific entries reflected bills for work he [Ferguson] did not do." (R. at 864-224 to -225). No one in the firm reported this over-billing to the Utah State Bar, which all who "knew" this to be "true" were ethically bound to do. (R. at 864-259 to -261). Ferguson thus showed inconsistent and willfully false testimony that should have reached the jury.

The directed verdict was improper in this case because "[i]f there is a reasonable basis in the evidence that would support a verdict in favor of the losing party, the directed verdict cannot stand." *Brehany v. Nordstrom*, 812 P.2d 49, 57 (Utah 1991) (citing

Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982)). And, "whether the holder of the [conditional] privilege lost it due to abuse presents a question of fact." *O'Connor v. Burningham*, 2007 UT 58, ¶ 38, 165 P.3d 1214, 1224 (citing *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 53, 116 P.3d 271; *Brehany*, 812 P.2d at 58; *Combes v. Montgomery Ward & Co.*, 119 Utah 407, 228 P.2d 272, 274-75 (1951)). A federal district court sitting in diversity, and thus, applying Utah law, succinctly explained why: "Whether Defendants acted with malice is a determination for a jury to make after hearing the evidence and assessing the credibility of those who testify. For this court to make such a finding would invade the province of the jury and constitute reversible error." *Murphree v. US Bank of Utah, N.A.*, 282 F. Supp. 2d 1294, 1298-99 (D. Utah 2003). The jury should have had the opportunity to weigh the inconsistent statements heard at trial and accept or reject what could have constituted willfully false testimony from defendant Williams, and the bald unsupported assertions in appellees' response mirror the reasoning in directing a verdict in the first place.

ARGUMENT

ISSUE I

Defendants/appellees hope to avoid this Court's long-standing and still binding conditional privilege precedent by "correcting" this Court in arguing that old precedent, namely *Hales v. Commercial Bank*, 197 P.2d 910 (Utah 1948), no longer applies due to United States Supreme Court defamation law developments. Appellees also cite to several non-Utah cases, which do not prove instructive in the present case because clearly applicable precedent from this Court exists and governs. *See O'Connor*, 2007 UT 58, 165 P.3d 1214; *Wayment v. Clear Channel Borad., Inc.*, 2005 UT 25, 116 P.3d 272. Whatever appellees' protestations, Utah cases faithfully follow the United States Supreme Court's teachings in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1972). *Hales* remains good law and this Court's recent defamation cases control this action and dictate reversal of the trial court's directed verdict.

The Utah common law reasonable belief standard (and as discussed below, it comports with the actual malice concept defendants/appellees argue for) fits within permissible "knowledge" or "reckless disregard" post *Gertz* and post Restatement (Second) of Torts section 601 merger into section 600. Truly, the reasonable belief standard and the common law malice standard are not mutually exclusive. The *Combes v. Montgomery Ward & Co.*, 228 P.2d 272, 275 (Utah 1951) case, which cited to the *Hales* case, stated in addition to the required factors for a conditional privilege to apply, "[t]here must also be an honest belief in the truth of the statement. When these facts are

found to exist, the communication is protected by the law, unless the plaintiff can show malice on the defendant's part; the burden in this respect being on the plaintiff." The *Combes* court embraced the same heightened requirement to defeat the conditional privilege as the post *Gertz* cases and Restatement counsel:

> It should be borne in mind that there is a distinction between the malice which is implied from every defamatory publication and the actual malice which is necessary to remove a conditional provilege [sic], the privileged communication being an exception to the rule that every such defamatory publication implies malice; *National Standard Life Ins. Co v. Billington*, Tex.Civ.App., 89 S.W.2d 491 at page 493, states a definition of this type of malice which has been used and approved by numerous courts: 'This kind of malice * * * which overcomes and destroys the privilege, is, of course, quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an 'indirect and wicked motive which induces the defendant to defame the plaintiff.'
>
> Where the conditional privilege exists, the defendant is protected unless plaintiff pleads and proves facts which indicate actual malice in that the utterances were made from spite, ill will or hatred toward him and, unless the plaintiff produces such evidence, there is no issue to be submitted to the jury, *Speilberg v Kuhn & Brother Co. et al.*, 39 Utah 276, 116 P. 1027; *Williams v. Standard Examiner Pub. Co.*, 83 Utah 31, 27 P.2d 1. The law concerning this principle is well stated by the court in the case of *Wagner v. Scott*, 164 Mo. 289, 63 S.W. 1107, where the court, quoting from Newell, Slander and Libel, says at page 1111: 'The jury, however, will be the proper tribunal to determine the question of express malice where evidence of ill will is forthcoming; but if, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the case from a jury, and direct a verdict for the defendant.'

228 P.2d at 276-77 (emphasis added). Ferguson meets this long-standing Utah common law malice requirement to defeat any possible conditional privilege defendants/appellees may invoke due to defendant Williams' admissions on cross-examination. (R. at 864-224

to -226). Utah law is in complete harmony with United States Supreme Court precedent and Restatement principles.

This Court's precedent controls the outcome of this case. The Restatement may inform this Court and other Utah courts, but the Restatement need not control the issues present here because:

> The American Law Institute's restatements are drafted by legal scholars who attempt to summarize the state of the law in a given area, predict how the law is changing, and suggest the direction the law should take. The restatement serves an appropriate advisory role to courts in approaching unsettled areas of law. We emphasize, however, that section 402A of the Restatement (Second) of Torts, as drafted in 1965, is not binding on our decision in this case except insofar as we explicitly adopt its various doctrinal principles.

Grundberg v. Upjohn Co., 813 P.2d 89, 95 (Utah 1991). Nonetheless, the concepts found in section 600 harmonize with both past and current Utah precedent, the trial court merely misapprehended both sources of authority when it instead applied inapposite Alaska law to this case, *DeNardo v. Bax*, 147 P.3d 672 (Alaska 2006) and *Mount Juneau Enterprises, Inc. v. Juneau Empire*, 891 P.2d 829 (Alaska 1995), in granting the directed verdict, which constitutes reversible error.

Defendants/appellees destroyed Ferguson's reputation. "'At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation.'" *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994). In Utah, "a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule." *West*, 872 P.2d at 1008 (citing *Cox*, 761 P.2d at 561 (citing Utah Code Ann. § 45-2-

2(1))). This Court recognizes that "the integrity of an individual's reputation is essential to his standing in society, in his vocation, and even in his family." *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 973 (Utah 1981). Defendants/appellees defamed Ferguson, damaging his good reputation in the medical malpractice defense field in the process, with actual malice, and therefore abused any conditional privilege that would have otherwise applied.

Several federal court decisions have analyzed and followed this Court's consistent conditional privilege decisions. Recently, in *MacArthur*, the district court explained:

> As detailed most recently in the *Wayment* opinion, the question of "requisite degree of fault" that must be shown largely turns upon whether the plaintiff is in some sense a "public figure." 2005 UT 25, ¶¶ 17-36, 116 P.3d 271, 279-84. If a plaintiff is a non-"public" private individual, "the necessary degree of fault which must be shown in a defamation action ... is negligence." *Seegmiller*, 626 P.2d at 973; *accord, In re I.M.L. v. State of Utah*, 2002 UT 110, ¶ 25, 61 P.3d 1038, 1045 ("in a civil action for libel 'actual malice' is required if the statement concerns a public official, whereas only negligence is required if the statement concerns a private citizen"); see 50 Am.Jur.2d Libel and Slander § 21 (1995).

MacArthur v. San Juan County, 416 F. Supp. 2d 1098, 1184 (D. Utah 2005). In *Murphree*, the court noted "Utah courts have defined common law malice as "ill will or spite." 282 F. Supp. 2d at 1297 (citing *Cox v. Hatch*, 761 P.2d 556, 560 n.3 (Utah 1988)). The court elaborated: "In addition, in *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-05 (Utah 1992), the Utah Supreme Court recognized that common law malice is demonstrated by statements that 'were made with ill will, were excessively published, or the defendant did not reasonably believe his or her statements were true.'" *Id.* (quoting *Russell*, 842 P.2d at 905). "To be demonstrably 'true' or 'false,' the published statements must be statements of *fact*, not mere opinion or belief." *B.J.*

Barnes & Sons Trucking, Inc. v. Dairy Farmers of America, Inc., No. Civ. 2:05-CV-351BSJ, 2006 WL 1472689, at *3 (D. Utah May, 22, 2006) (emphasis in original).

The *Russell* court stated: "Under the common law standard of malice, to overcome a conditional privilege, a plaintiff must show an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that the publication was excessive." 842 P.2d at 904. Determining the honesty of a witness is entirely the jury's province. And, under the *Brehany* standard of review, the question whether defamation is conditionally privileged remains a question of law *unless* a genuine factual issue exists whether scope of privilege exceeded or defendant acted with actual malice. Ferguson raised numerous genuine factual issues of actual malice at trial as shown in his statement of facts presented to this Court, which defendants/appellees remain unable to refute or controvert (except by unsupported, conclusory "no evidence" statements).

Defendants/appellees incorrectly rely on Restatement (Second) of Torts section 603 in an attempt to defend their position. However, section 603, comment a begins with the following quote, omitted from the Brief of Appellees:

> Any conditional privilege is created because the interest of the publisher, the recipient of the defamatory publication or some third person or an interest of the public is actually or apparently involved, and the knowledge by the recipient of the defamatory matter, <u>if it is true</u>, is likely to be of service in the protection of that interest. If the defamatory matter is not in any part published for its protection, the privilege is abused.

Restatement (Second) of Torts § 603, comment a (1977) (emphasis added). As Ferguson testified and showed in the record, over-billing was simply not true. Arthur Glenn, the

alleged over-billing victim, did not find anything unusual in Ferguson's billing, even after investigation. (R. at 185, Ex. B at 22). When asked to demonstrate an honest belief, defendants/appellees did not show Arthur Glenn any proof of over-billing. (R. at 185, Ex. B at 25; 864-299 to -300, -304). The defamatory over-billing simply was not true. Any possible conditional privilege was abused and lost due to the untruths surrounding appellees' calculated method to not only fire Ferguson, but to destroy his reputation with his main client and then take Ferguson's case. The trial court should not have directed the verdict.

ISSUE II

Appellant wishes to correct an error made in the Brief of Appellant previously filed with this Court. As appellees point out, Issue II should not relate to summary judgment as to intentional interference with prospective business relations as to Siegfried and Jensen as incorrectly noted in the Statement of Issues and Summary of the Arguments sections of the Brief of Appellant, but rather should relate to intentional interference with prospective business relations as to UMIA, as specified in the Argument section of that brief. Appellants determined not to present the Siegfried and Jensen issue to this Court, but failed to properly edit the earlier portions of the brief to reflect that decision. However, Appellants did wish to present the intentional interference with prospective business relations as to UMIA to this Court, although this issue arises not from summary judgment, where Judge Medley correctly denied summary judgment, but rather as an effect of the incorrect directed verdict based on the conditional privilege issue.

Ferguson described the contextual facts and circumstances surrounding the defamation published to UMIA, the client for whom Ferguson did 100% work for in 2005, by defendants/appellees. (R. at 863-69). These facts and circumstances illustrate his intentional interference with prospective economic relations with UMIA claim, which forms a substantial part of Ferguson's damages. "The tort of intentional interference with prospective economic relations reaches beyond protection of an interest in an existing contract and protects a party's interest in prospective relationships of economic advantage not yet reduced to a formal contract (and perhaps not expected to be)." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 302 (Utah 1982) (citing *Buckaloo v. Johnson*, 14 Cal.3d 815, 537 P.2d 865, 868-69, 122 Cal.Rptr. 745, 748-49 (1975); Restatement (Second) of Torts § 766B comment c; Prosser, *Handbook of the Law of Torts* § 130 (4th ed. 1971)). In the *Leigh* case, this Court recognized "a common-law cause of action for intentional interference with prospective economic relations," and adopted the Oregon definition of this tort. *Id.* at 304 (citing *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371, 374 (1979); *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 205, 209, 582 P.2d 1365, 1368, 1371 (1978)). "Under this definition, in order to recover damages, the plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Id.*

The United States District Court for the District of Utah recently reviewed these principles:

> The "economic relations" protected by this theory are diverse. "Driving away an individual's existing or potential customers is the archetypical injury this cause of action was devised to remedy. *E.g., Guillory v. Godfrey*, 134 Cal.App.2d 628, 286 P.2d 474 (1955); *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); W. Prosser, Handbook of the Law of Torts § 130 (4th ed. 1971); Restatement (Second) of Torts § 766B(a)," *Leigh*, 657 P.2d at 306, but protection extends to "any prospective contractual relations ... if the potential contract would be of pecuniary value to the plaintiff" (excluding contracts to marry), as well as "a continuing business or other customary relationship not amounting to a formal contract." Restatement (Second) of Torts § 766B comment c (1979).
>
> The question of interference for an "improper purpose" or by an "improper means" requires the weighing of several relevant factors:
>
> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

MacArthur, 416 F. Supp. 2d at 1182-83 (quoting Restatement (Second) of Torts § 767(a)-(g) (1979)). "The alternative of improper purpose will be satisfied where it can be shown that the actor's predominant purpose was to injure the plaintiff...." *Id.* (citing 657 P.2d at 307) (footnote & citations omitted). If the actor's conduct is directed solely to the satisfaction of his spite or ill will and not at all to the advancement of his competitive interests over the person harmed, his interference is held to be improper. Restatement (Second) of Torts § 768 comment g. When giving consideration to the factors listed directly above, (a) through (g), and recalling the facts Ferguson cites from the record in this case, improper purpose by defendants/appellees in defaming Ferguson and interfering with his prospective business relations becomes readily apparent, and this

issue flows directly from the underlying defamation in this case, for which the trial court should not have directed the verdict.

ISSUES III & IV

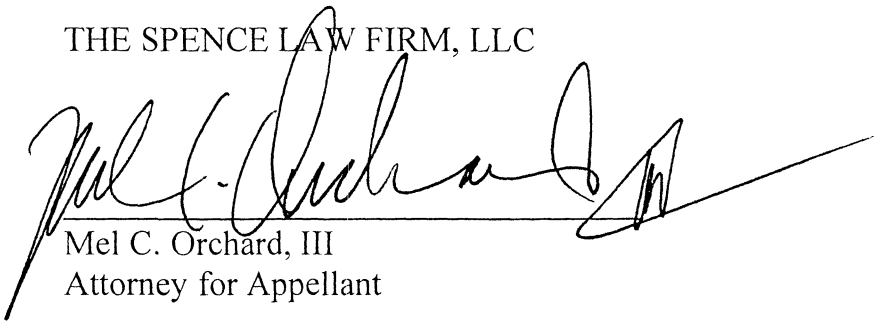
The trial court should not have granted summary judgment to defendant Frankenburg because he was a central player in the central issue in this case, the defamation of Ferguson to UMIA, and the retention of all of Ferguson's UMIA legal business, by defendants/appellees. The trial court should not have granted defendants' motions in limine because the issues went to the heart of Ferguson's malice burden of proof and were directly relevant thereto. The totality of circumstances reviewed in context of the facts supported in the record in this case support a finding of actual malice that shows an abuse by defendants/appellees of any possibly applicable conditional privilege to the defamatory per se statements about Ferguson. The trial court should not have directed the verdict against Ferguson.

CONCLUSION

The trial court, through summary judgment, motion in limine ruling, and directed verdict upon close of Plaintiff's evidence disregarded the genuine issues of material fact and the reasonable bases in the evidence that would support a verdict. For all the foregoing reasons, Ferguson respectfully requests that this Court reverse the trial court's summary judgment order as to defendant Frankenburg, the trial court's motion in limine ruling, and the trial court's directed verdict and remand this case for trial.

DATED this 10th day of September 2008.

THE SPENCE LAW FIRM, LLC



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing Reply Brief of Appellant to be sent via United States Mail, this 10th day of September 2008, to the following:

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